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7 **STATE OF WASHINGTON**  
8 **KING COUNTY SUPERIOR COURT**

9 STATE OF WASHINGTON,

NO.

10 Plaintiff,

COMPLAINT FOR INJUNCTIVE  
AND ADDITIONAL RELIEF UNDER  
THE CONSUMER PROTECTION  
ACT, RCW 19.86, AND THE  
COMPUTER SPYWARE ACT, RCW  
19.270

11 v.

12 ASCENTIVE, LLC, a Delaware Limited  
Liability Company,

13 Defendant.

14 COMES NOW PLAINTIFF, State of Washington, by and through its attorneys, Robert  
15 M. McKenna, Attorney General, and Jason E. Bernstein, Assistant Attorney General, and  
16 brings this action against Defendant named herein, alleging as follows on information and  
17 belief:

18 **I. JURISDICTION AND VENUE**

19 1.1 This Complaint is filed and these proceedings are instituted under the provisions  
20 of the Consumer Protection Act, RCW 19.86, the Commercial Electronic Mail Act,  
21 RCW 19.190, and the Computer Spyware Act, RCW 19.270. Plaintiff seeks a permanent  
22 injunction and other equitable relief, including damages, restitution, civil penalties, and  
attorneys' costs and fees, based on violations of the above named statutes.

23 1.2 The violations alleged in this Complaint have been and are being committed in  
24 whole or in part in King County, Washington, by Defendant named herein. Authority of the  
25  
26

1 Attorney General to commence this action is conferred by RCW 19.86.080, RCW 19.86.140,  
2 RCW 19.190.100 and RCW 19.270.070.

## 3 II. DEFENDANT

4 2.1 Defendant Ascentive, LLC ("Ascentive"), is a Delaware limited liability  
5 company. Its principal place of business is at 201 Spring Garden St., Suite 400, Philadelphia,  
6 PA 19123. At all times relevant to this action, Defendant Ascentive was engaged in the  
7 marketing and sale of digital products over the Internet.

## 8 III. NATURE OF TRADE OR COMMERCE

### 9 Overview

10 3.1 At all times material to this action, Ascentive ("Defendant") has offered various  
11 software products for sale on the Internet.

12 3.2 Defendant's products include: ActiveDefender, ActivePrivacy, ActiveSpeed,  
13 PC ScanandSweep, PC Speedscan Pro, RAMRocket, Spyware Striker Pro, and WINRocket.

14 3.3 Defendant refers to its products collectively as a "suite of performance-  
15 enhancing and PC maintenance software."

16 3.4 Defendant claims generally that the products can identify and remove spyware;  
17 clean a computer's registry to make it operate faster; optimize a computer's Internet settings to  
18 improve the computer's speed; and rid a computer of "clutter" to improve its performance.

19 3.5 Defendant advertises its "suite" of products using television, radio, print  
20 magazines and newspapers, websites, Internet search engines, emails, and Internet banner  
21 advertising.

22 3.6 Defendant sells its "suite" of products on various Web sites owned and operated  
23 by Defendant, including: [www.fastatlast.com](http://www.fastatlast.com), [www.finallyfast.com](http://www.finallyfast.com), [www.finallyfastpc.com](http://www.finallyfastpc.com),  
24 [www.pcfinallyfast.com](http://www.pcfinallyfast.com), [www.scanyourpc.com](http://www.scanyourpc.com), [www.escaneorapido.com](http://www.escaneorapido.com).

1           3.7 Defendant also uses third-party affiliates to advertise, market, and sell its  
2 products.

3           3.8 Along with its software products, Defendant markets and sells add-ons, such as  
4 back-up copies of the software programs and an extended download service.

5           3.9 Defendant advertises, markets, and sells its products to consumers in  
6 Washington State and across the United States and is in competition with others engaged in the  
7 sale and marketing of similar software products in and from Washington.

8           3.10 From May 2007 to May 2009, at least ten thousand Washington consumers  
9 have been charged by Defendant for its software products.

10                           Defendant's Internet Marketing and Advertising

11           3.11 Defendant advertises and markets its software products widely on the Internet.

12           3.12 Defendant uses a variety of advertisements on the Internet, including banner  
13 advertisements on websites.

14           3.13 Many of Defendant's banner advertisements contain warning symbols and/or  
15 verbal warning messages, some of which appear in flashing red capital letters.

16           3.14 Some of Defendant's banner advertisements use such warning symbols and  
17 verbal warning messages in conjunction with simulations of processes being run on the  
18 computer.

19           3.15 Some of Defendant's banner advertisements represent the average number of  
20 errors on a user's computer without any source to the claim.

21           3.16 The average number of errors changes depending on the advertisement, and in  
22 some advertisements, the average number of errors rotates among several different numbers,  
23 simulating a real-time updating of the number.

1           3.17 Some of Defendant's banner advertisements resemble Windows XP operating  
2 system messages and purport to be a "Connection Assistant" with a recommendation that the  
3 consumer "Update Now."

4           3.18 In some banner advertisements for ActiveSpeed, Defendant claims that the  
5 product can boost the computer's Internet connection speed "by 375%."

6                           Defendant's Email Marketing and Advertising

7           3.19 Defendant has run large electronic mail marketing campaigns to sell its software  
8 products.

9           3.20 Defendant and/or its affiliates have sent millions of commercial electronic mail  
10 messages to consumers.

11           3.21 In some of Defendant's email marketing campaigns, Defendant or its affiliates  
12 have used the subject line "Microsoft Recommends this one download to make your computer  
13 run like new."

14           3.22 Defendant has used the subject line "Your internet connection may be  
15 malfunctioning" in the emails purportedly from "Internet Alert Service."

16           3.23 Defendant has also used the subject line "Your internet connection is slower  
17 than it should be" in email marketing campaigns.

18  
19                           The Free Scan

20           3.24 Defendant advertises, markets, and sells PC SpeedScan Pro, Spyware Striker  
21 Pro, PC ScanandSweep Pro, and ActiveSpeed on the Internet and by electronic mail by  
22 offering consumers a free scan of their computers to identify any problems the computers  
23 might have, including the presence of spyware or viruses, registry "errors" and other computer  
24 "clutter," and sub-optimal Internet settings.

1           3.25 Defendant also advertises its products heavily on television by featuring its  
2 website [www.finallyfast.com](http://www.finallyfast.com).

3           3.26 According to at least one of the commercials, finallyfast.com can get rid of:  
4 junk files, spyware, adware, and registry errors.

5           3.27 In the advertisements, the website is marketed as though just one product is  
6 necessary to solve all the computer's problems, but in fact, the website [www.finallyfast.com](http://www.finallyfast.com)  
7 features primarily PC SpeedScanPro, which is only one of four Ascentive products, all of  
8 which are necessary to cover each type of error described in TV advertisements.

9           3.28 Defendant markets its website as the ultimate solution for several computer  
10 issues such as: a slow computer that is not as fast as it used to be, an unreliable Internet  
11 connection, a brand new computer that is not as fast as it ought to be, and a computer that  
12 freezes and crashes.

13           3.29 The commercial entices consumers into visiting [www.finallyfast.com](http://www.finallyfast.com) by  
14 offering a free scan of their computer and claiming that consumers can save hundreds, if not  
15 thousands, of dollars by simply taking the free performance test.

16           3.30 In order for a user to perform a free scan of his or her computer, he or she must  
17 download and install the scan software.

18           3.31 There are various undisclosed features of the free scan software, however.

19           3.32 For example, for a period of time prior to March 2009, the free scan software  
20 for each of these products would include the installation of a program called "Performance  
21 Center," a program that contains advertisements and the executables for Defendant's suite of  
22 products and that prompts consumers to download each of the programs in the suite.

23           3.33 In effect, Defendant, without the consumer's knowledge or consent,  
24 surreptitiously installs an advertising program on the consumer's computer when the consumer  
25 installs the free scan software.  
26

3.34 In addition to the undisclosed software installation, the free scan software has other surprise features, such as launching excessive pop-up warnings/reminders of the status of the consumer's computer, misrepresenting the status of the user's computer, launching user interfaces of the programs and nagging alerts upon boot-up of the computer, and misrepresenting and exaggerating the problems found in the computer.

3.35 Defendant fails to disclose these features of the free scan software.

3.36 The free scan results in some instances misrepresent the nature and severity of the “errors” or “problems” identified on the computer.

3.37 Furthermore, the excessive pop-ups and alert messages generated by the scan software contribute to the misrepresentation of the urgency and necessity of installing and purchasing Defendant's software products.

3.38 In all, Defendant's marketing campaigns – from the initial advertisement to the free scan results and software installation – misrepresent the utility of its products, exaggerate the problems found in the consumer's computer, and harass the consumer with nagging and exaggerated warnings and alerts into purchasing the products.

## PC SpeedScan Pro

3.39 Defendant claims that its product PC SpeedScan Pro is able to “search for thousands of errors on your PC,” “instantly removes all PC errors found,” and “returns your PC to its original high performance.”

3.40 The free scan categorizes everything that it identifies as an “error.”

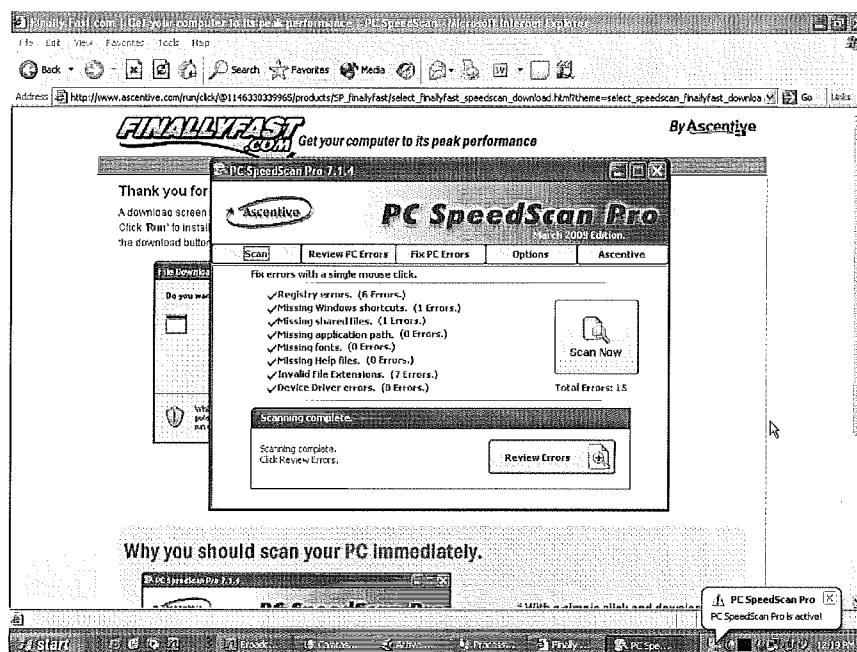
3.41 The “errors” are broken down into sub-categories, including, but not limited to, “registry errors,” “missing window shortcuts,” and “invalid file extensions.” See Figure 5.

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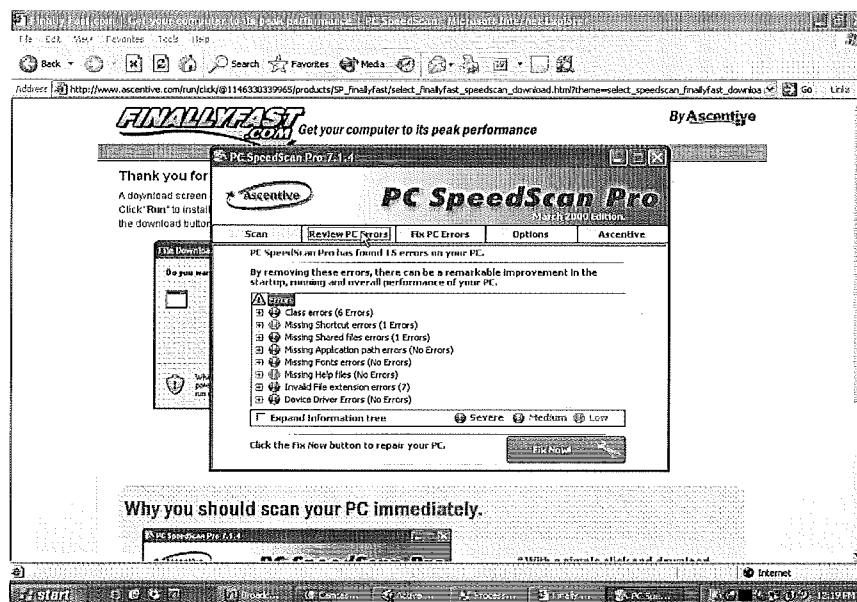
///

Figure 5.



3.42 The error categories are each assigned a severity level, such that anything flagged as an error in "class errors," "invalid file extension errors," or "device driver errors" is automatically assigned a severity label of "Severe." See Figure 6.

Figure 6.

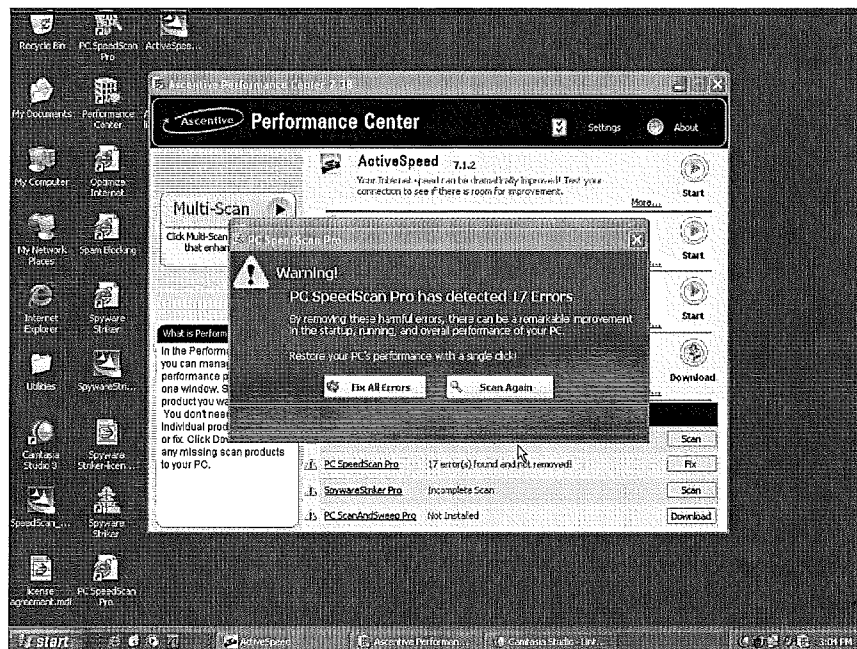


3.43 In order to fix the errors, the consumer must purchase the product.

3.44 If the consumer does not purchase the product, the free scan program will generate pop-ups reminding the consumer of the errors found on the computer until the consumer either purchases the product or uninstalls it entirely.

3.45 Some of the pop-ups also use or used the yellow warning icon with the exclamation point and text reading “Warning!” See Figure 7.

Figure 7.

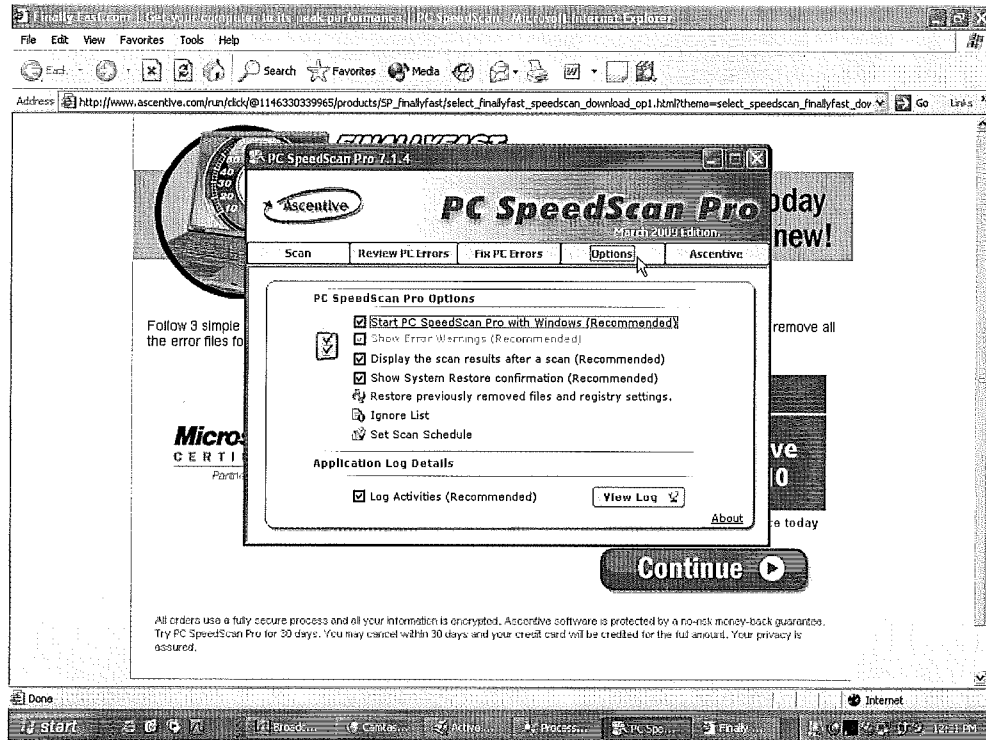


3.46 These error and warning pop-ups will appear over and over again as long as the consumer does not purchase the product.

3.47 If the consumer is able to find the “options” link in the PC SpeedScan Pro interface and clicks on it, he or she will be shown several options, which can be checked or unchecked.

3.48 However, in some earlier versions, the option to “Show Error Warnings” is checked by default and disabled, so the consumer cannot un-check it. See Figure 8.

Figure 8.



3.49 In later versions of its programs, Defendant included an “alert settings” button on its pop-ups, which would permit consumers to “turn off alert settings.”

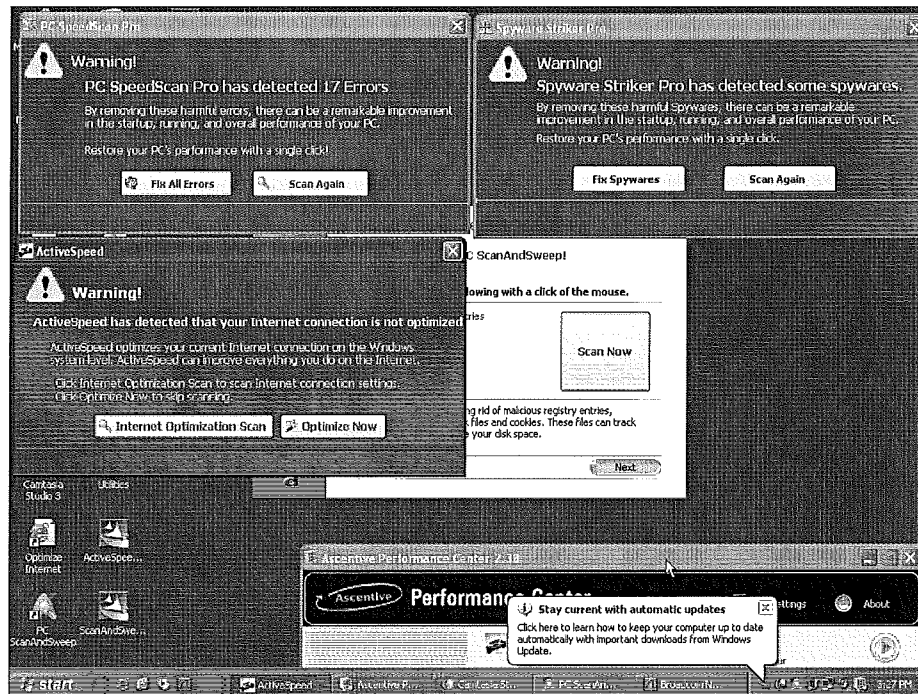
3.50 However, in testing, it is not clear what “alert settings” are affected by this option. Clicking a link to turn alert settings off did not stop the pop-ups.

3.51 Defendant made this change to its programs only after they were “blacklisted” by a reputable website called [www.stopbadware.org](http://www.stopbadware.org).

3.52 The excessive pop-ups interfere with the consumer’s ability to use his or her computer; the consumer is forced to close one pop-up after another to return to his or her task.

See Figure 9.

Figure 9.



3.53 Figure 9 above shows the multiple pop-ups that are generated by several of Defendant's free scan programs after re-starting a computer with the programs installed but not purchased. Upon restarting the computer, each installed Ascentive product generates a pop-up warning the user of unresolved problems. When these pop-ups are closed, the product automatically launches as a response, causing still more pop-ups and reminders.

#### ActiveSpeed

3.54 ActiveSpeed purportedly can make a computer's Internet connection run faster by optimizing its Internet settings.

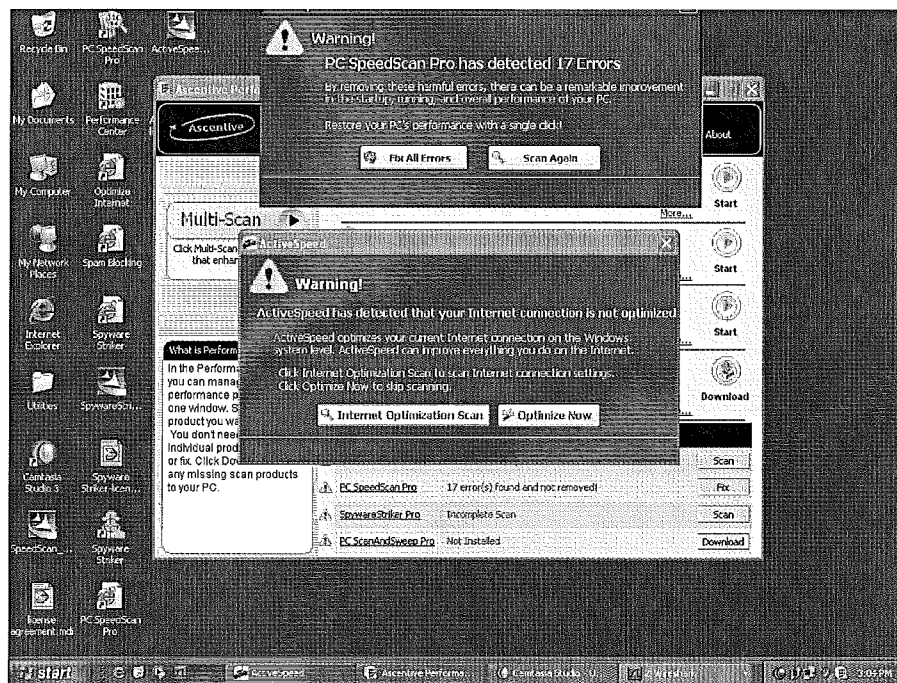
3.55 Defendant has claimed that "ActiveSpeed can make your Internet connection run up to 375% faster!"

3.56 Defendant tells consumers to "Download ActiveSpeed FREE and we'll prove it!"

1           3.57   However, the “free” download is for a scan only and does nothing to increase  
2 the consumer’s Internet connection speed; therefore, Defendant cannot prove to consumers that  
3 its product can make the consumer’s Internet connection “375% faster.”

4           3.58   After the consumer installs ActiveSpeed, but before running a scan, the program  
5 generates a pop-up that informs the consumer that the computer’s Internet connection is not  
6 optimized. See Figure 10.

7 Figure 10.



9           3.59   This pop-up comes in the form of a “Warning!” complete with a warning icon  
10 and exclamation point.

11           3.60   Without consumer intervention, the scan starts.

12           3.61   Even on a computer with some settings previously optimized, the scan shows  
13 that the computer’s connection is not optimized.

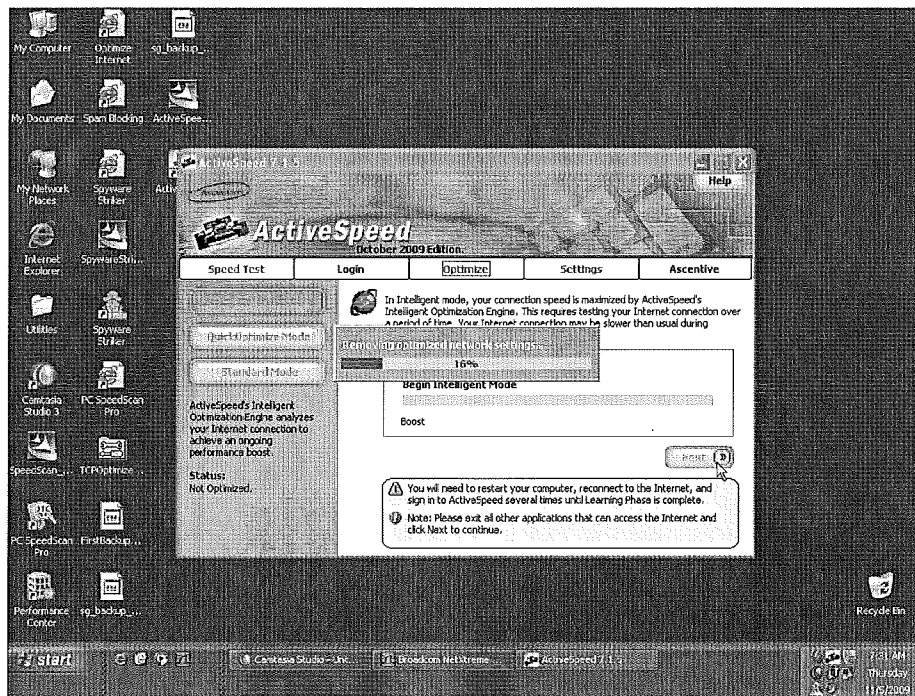
14           3.62   Defendant claimed its response to a Civil Investigative Demand issued by the  
15 Attorney General’s Office: “*If the application detects one or more previous attempts to*  
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1 *optimize packet transmission, the user is notified so he or she may avoid the unnecessary*  
2 *purchase of Internet optimization software.”*

3 3.63 However, in testing, after installing TCPOptimizer, an Internet setting  
4 optimization program, on the computer and using it to optimize Internet connection settings,  
5 ActiveSpeed still reported that the computer’s settings were not optimized.

6 3.64 Instead, in testing, when ActiveSpeed indicated that it was optimizing the  
7 computer’s settings, it began by “[r]emoving optimized network settings.” See Figure 11.  
8

9 Figure 11.



22 3.65 Unlike the claim in the marketing materials, in order to test the performance  
23 (and the advertising claim) of ActiveSpeed, the consumer has to purchase the program.

24 3.66 Furthermore, Defendant has no substantiation for its advertised claim that  
25 Active Speed can make a computer’s Internet connection operate up to 375 percent faster.  
26

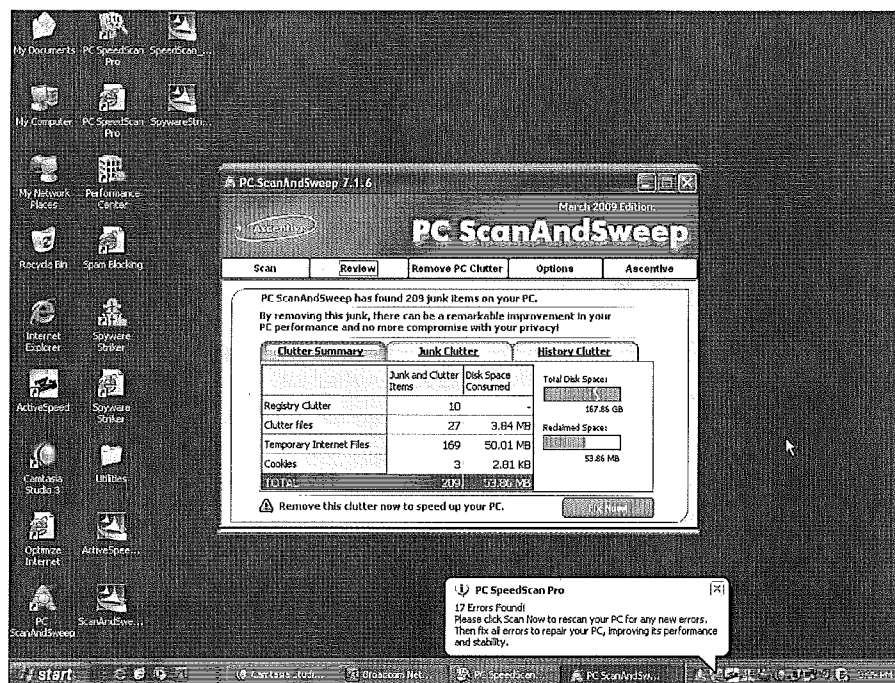
## PC ScanandSweep

3.67 Defendant claims that PC ScanandSweep finds useless files and registry key errors that are cluttering the consumer's computer and removes them, thereby freeing disk space and improving the computer's speed.

3.68 After the consumer installs PC ScanandSweep and runs a free scan, the program shows the consumer how much "clutter" is on the computer.

3.69 An older version of the program quantified the clutter in terms of its byte size and then showed a graphic representation of the percentage of the consumer's hard drive that is cluttered. See Figure 12.

Figure 12.



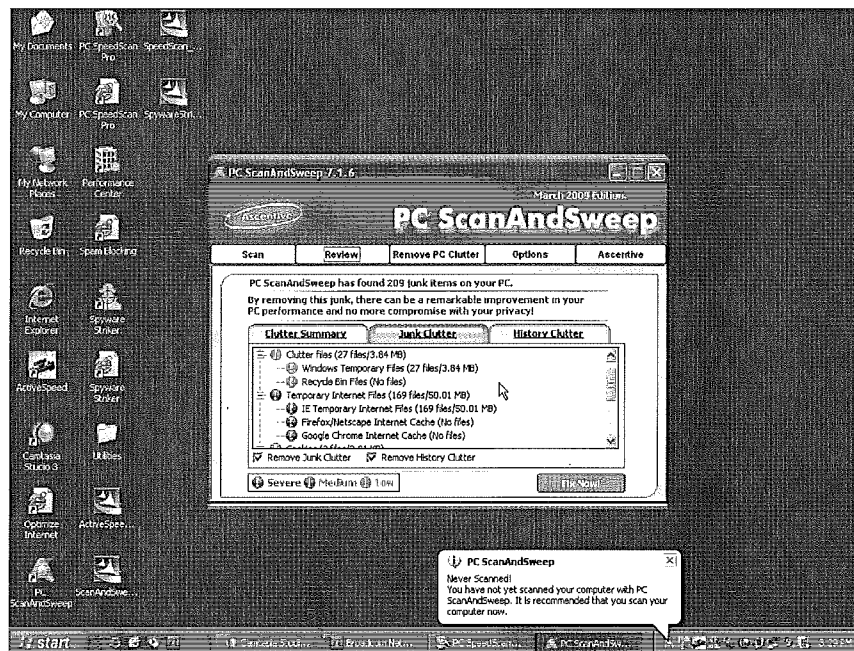
3.70 However, the graph visually misrepresents the percentage of the consumer's computer hard drive that is taken up by the so-called "clutter."

3.71 In Figure 12 above, for example, the graph suggests that half of the computer's hard drive is "cluttered" by approximately 53 MB; however, 53 MB is only a tiny percentage of the total size of the hard drive, which is 167 GB (1 GB=1024 MB).

3.72 The program also classifies the "clutter" into categories of "severe," "medium," and "low."

3.73 Without any explanation, the color of the text and the image of an exclamation mark suggest or imply that the categories are associated with levels of risk or harm posed by the clutter. See Figure 13.

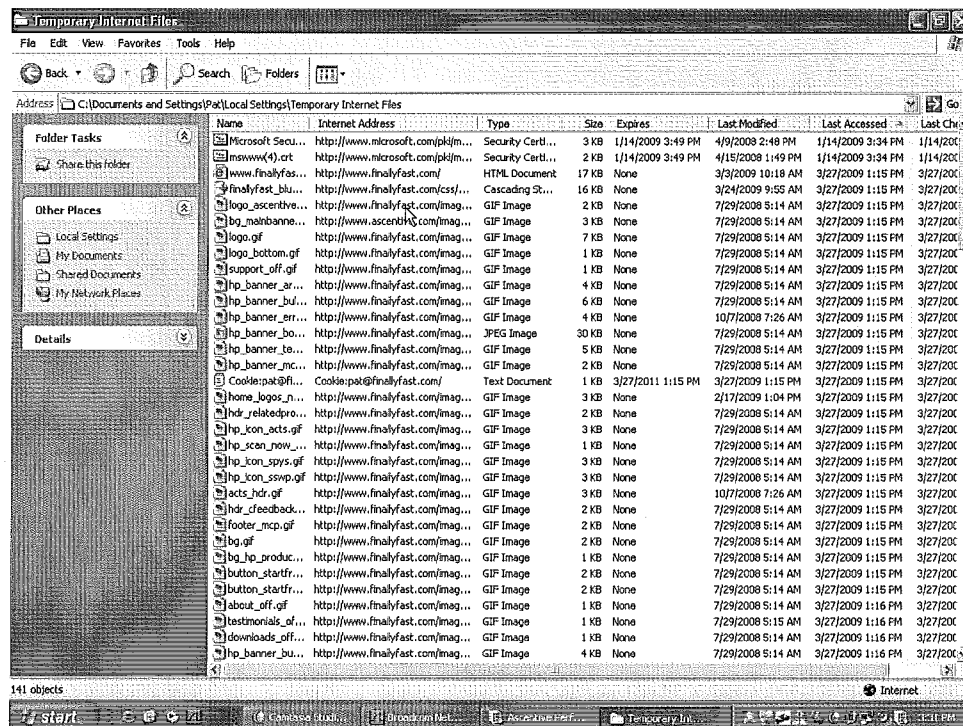
Figure 13.



3.74 In testing, the files identified by PC ScanandSweep as "clutter" were harmless and posed no risk to the computer at all.

3.75 For example, in testing, the files identified as clutter and placed in the “severe” category were temporary Internet files associated with a visit to Defendant’s website, [www.finallyfast.com](http://www.finallyfast.com). See Figure 14.

Figure 14.



### Installation of the Performance Center

3.76 When a consumer downloads and installs one of Defendant’s software programs in the “suite” of programs, an additional program is installed at the same time.

3.77 The additional program is called Performance Center, and it is a centralized interface featuring all of the programs in the “suite.”

3.78 The Performance Center enables the consumer to install other programs to run free scans.

1           3.79    The Performance Center will also automatically open when the computer is re-  
2 started based on recommended default settings.

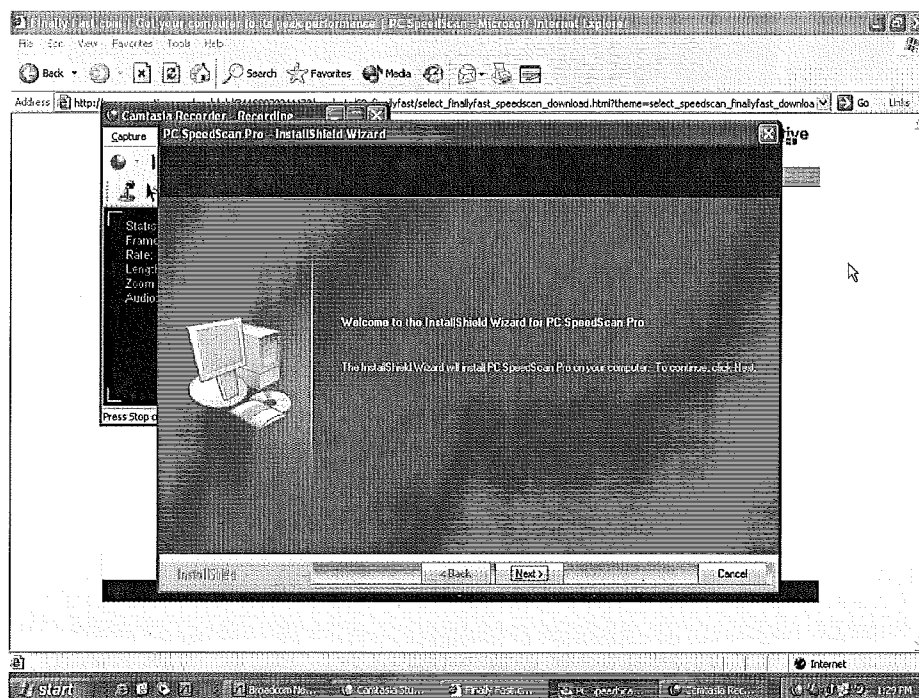
3           3.80    The program places an icon on the consumer's desktop.

4           3.81    The Performance Center program is not necessary for the operation of the free  
5 scan software that the consumer downloads.

6           3.82    The Performance Center is essentially an advertisement for Defendant's other  
7 products that are installed on the consumer's computer when the consumer installs one of the  
8 free scan programs.

9           3.83    Prior to March 2009, Defendant did not disclose the fact that the Performance  
10 Center program would be installed when the consumer installed a free scan program. See  
11 Figure 15.

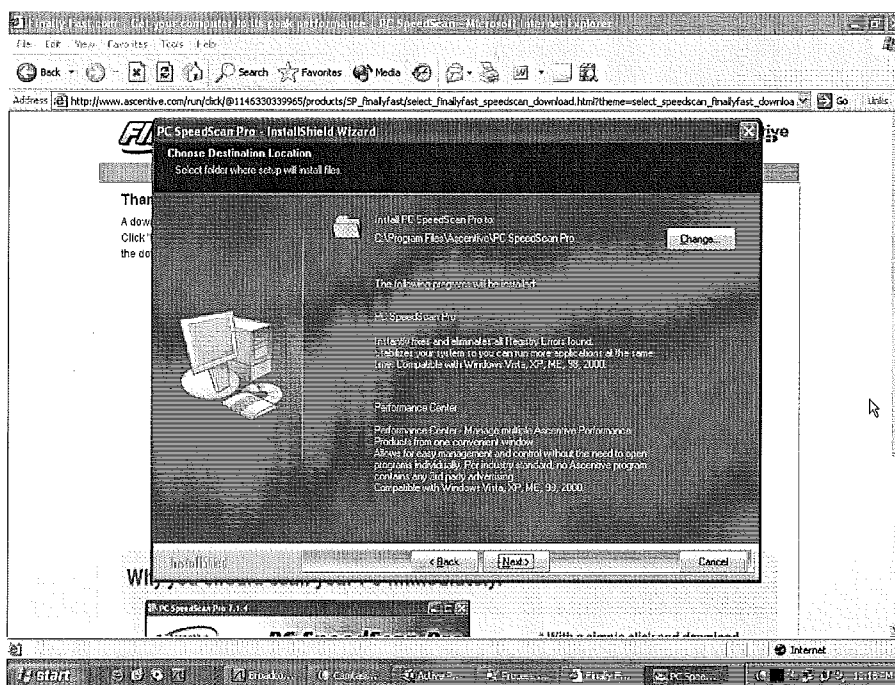
12  
13 Figure 15.



1 3.84 After this undisclosed installation was exposed by [www.stopbadware.org](http://www.stopbadware.org),  
2 Defendant included a notice during the installation process but did not include the option for  
3 the consumer to not have the program installed.

4 3.85 The notice that Defendant included does not disclose the specific details of what  
5 the Performance Center is or what it will do on the consumer's computer. See Figure 16.  
6 There is also no option to not install Performance Center.

7  
8 Figure 16.

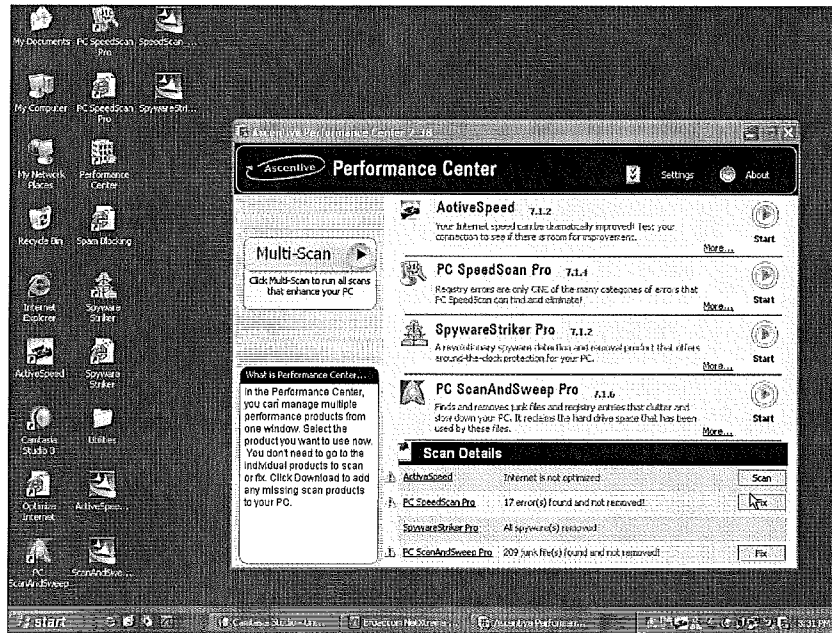


20 3.86 In fact, the Performance Center will automatically launch when the computer  
21 starts and at various other times.

22 3.87 Furthermore, if a consumer does not have all four programs installed,  
23 Performance Center makes it look like important components are missing through the use of a  
24 warning icon next to missing program titles. See Figure 17.

25 ///  
26

Figure 17.



3.88 Furthermore, the “scan details” inaccurately represents that the SpywareStriker Pro software removed spyware found on the computer even though none was ever present. See Figure 17 above.

#### Cancellation Process

3.89 Defendant obstructs consumers’ ability to cancel their orders and/or obtain refunds for products.

3.90 Defendant offers its products with a 30-day money back guarantee.

3.91 Defendant also offers some of its products through a free trial offer that will automatically convert to a paid subscription if the consumer does not cancel within the free trial period.

3.92 The cancellation process on Defendant’s website is cumbersome and requires the consumer to take numerous steps through numerous screens before he or she reaches a page on which he or she can submit a cancellation request.

1           3.93   However, when the consumer cancels their order on Defendant's website, the  
2 consumer is not informed that the cancellation is not yet complete.

3           3.94   After the consumer's online "cancellation," Defendant sends the consumer an  
4 electronic mail to which the consumer must respond in order to complete the cancellation. See  
5 Figure 18.

6  
7 Figure 18.

8           Re: [CANCEL] Ascentive Order (Thread: [REDACTED])  
9           From: "Ascentive Support" <support2007@ascentive.com>  
10           To: [REDACTED]  
11  
12           Dear [REDACTED],  
13           We have received your email requesting to cancel your service(s). Before you cancel, I would like  
14           to try to assist you with any issues you may be having with your software to try and get it  
15           working for you. If you would like some assistance, please let me know. If you still wish to  
16           cancel please let me know and I will process your cancellation for you. We hope that you will  
17           give us the chance to get your software working for you before you cancel.  
18           Please Note: Your service(s) have not yet been cancelled. If you do not wish us to assist you and  
19           just want to cancel please let us know so that we can process your cancellation.  
20           Also we always recommend our customers to run our software several times to ensure optimal  
21           results. At least 2 - 3 times per week would be sufficient.  
22           We want to provide you the best service! Let us know what you think. To participate in our survey  
23           go to:  
24           <https://websurveyor.net/web.d11/78218/AfterSupportSurvey.htm>  
25           Best regards,  
26           Chris B.  
            <http://www.ascentive.com>  
            Need immediate assistance?  
            Talk to a live representative during business hours with our NEW live chat! Also, check out our  
            Support Center online! Detailed support and step-by-step guides are available.  
            <http://www.ascentive.com/support/new>  
            Hours of Operation:  
            Monday - Friday 9am-5pm EST

20           3.95   This additional step is neither disclosed to the consumer at the time of online  
21 cancellation nor is necessary to Defendant in order to process cancellations.

22           3.96   If a consumer does not check his or her email or checks the email too late or if  
23 Defendant's email is filtered by a spam filter, the consumer will not have effectively cancelled  
24 the order and will then get charged for a product he or she thought was cancelled.  
25  
26

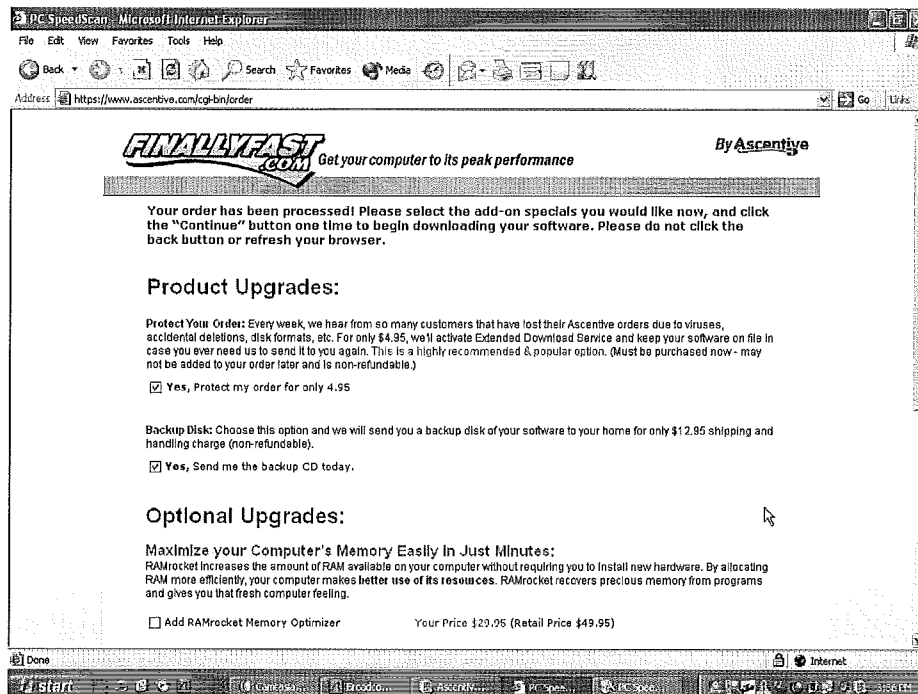
1           3.97 If the service is an annual subscription, according to Defendant's refund policy,  
2 the consumer will be responsible for a year's worth of charges if he or she does not cancel  
3 within the refund or trial period.

#### 4                           Add-ons Checked by Default

5           3.98 During the purchase and check-out process, Defendant checks by default the  
6 addition of two optional *and duplicative* products/services so that the consumer has to notice  
7 and un-check the boxes in order to avoid being billed for the product and service.

8           3.99 Defendant further confuses consumers by including these pre-checked items  
9 under a category called "Product Upgrades," which is above another category called "Optional  
10 Upgrades." See Figure 20.

11  
12 Figure 20.



1           3.100 The mischaracterization of the first category as “upgrades” standing in  
2 opposition to the “optional” products, which are not pre-checked, can easily lead the consumer  
3 to believe that these pre-checked items are included with their purchase.

4           3.101 Numerous consumers have complained to the company about the surprise total  
5 of the purchase when they received their credit card bills; the totals almost always amounted to  
6 the cost of the product and the two pre-checked add-ons.

7           3.102 According to Ascentive’s own statistics, almost 30% of its customers fail to  
8 uncheck both the Extended Download Service and Back-Up CD and end up purchasing them.  
9 The remaining customers who notice the pre-checked additions universally choose only one, or  
10 uncheck both boxes, with most rejecting both “upgrades.”

11                           Automatic Recurring Billing

12           3.103 Although Defendant markets its software as products, it is actually selling  
13 annual licenses that are billed on a recurring yearly basis where consumers who do not  
14 affirmatively cancel the service will be automatically renewed in the service and billed on the  
15 card used for the original purchase.

16           3.104 Defendant does not clearly disclose this fact in any of its marketing material or  
17 during the purchase process. See, e.g., Figure 21.

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Figure 21.

PC SpeedScan - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Forward Stop Home Search Favorites Media Print

Address: [https://www.ascentive.com/cgi-bin/order?referredby=@1146330339965&orderpackageId=SSCN1YEAR29&page=page2&theme=select\\_speedscan\\_finallyfast\\_download](https://www.ascentive.com/cgi-bin/order?referredby=@1146330339965&orderpackageId=SSCN1YEAR29&page=page2&theme=select_speedscan_finallyfast_download) Go Links

**FINALLY FAST .COM** Get your computer to its peak performance By **Ascentive**

**Dear PC SpeedScan User,**

Complete step 2 and 3 below and activate your copy of PC SpeedScan Pro for only \$29.95. You are just a few clicks away from a faster, more stable PC. Simply activate PC SpeedScan Pro with Ascentive.com and you can instantly remove all the errors that it finds harming and slowing down your PC.

PC SpeedScan Software Includes 1 year of FREE tech support, updates and service.

**Step 2. Your Account Information:**

Name

E-Mail

Create a User Name and Password.  
(This will be your login for PC SpeedScan Software)

User Name  Password

Address

City  State/Prov

Country  ZIP

Phone

Items in bold are required. In order to protect your card's security, we verify the address and phone no. you enter with your card's issuer. Your information is never shared with other companies.

**PC SpeedScan Pro**

All software is covered by a 100% satisfaction GUARANTEE!

**Microsoft**  
CERTIFIED  
Partner

Done Internet

start Contador... Broad... Ascentive... PC Speed... PC Speed... 8:33 PM

3.105 Defendant buries the disclosure of this automatic recurring billing in its License Agreement, a hyperlink to which is provided to the consumer during the purchase process. See Exhibit One, attached to this Complaint (“Ascentive End-User License Agreement”).

### Consumer Complaints

3.106 Defendant has received numerous complaints from consumers related to excessive pop-up reminders caused by the installation of Defendant’s free scan software. See Exhibit Two, attached to this Complaint (“Sample Electronic Mail Consumer Complaints”).

3.107 Defendant has been well-aware, given the number of complaints, that its software has unexpected effects and that it is unclear to consumers how to disable the pop-up reminders and/or uninstall the software.

1           3.108 Defendant did not make any changes to assist consumers in disabling the pop-  
2 up reminders until Defendant received a negative review from an anti-malware organization  
3 called StopBadware.org.

4           3.109 Defendant also received numerous complaints from consumers about  
5 unexpected charges on their credit card bills. See Exhibit Two.

6           3.110 The higher amounts appearing on consumers' credit card bills corresponded to  
7 charges for optional items that were pre-checked on Defendant's website check-out page.

8           **IV. FIRST CAUSE OF ACTION – MISREPRESENTATIONS IN VIOLATION OF**  
9           **THE CONSUMER PROTECTION ACT**

10          4.1 Plaintiff realleges paragraphs 1.1 through 3.119 above and incorporates them as  
11 though fully set forth herein.

12          4.2 During the course of advertising, marketing, and selling its various software  
13 products, Defendant makes numerous material misrepresentations, including:

- 14           a. Defendant misrepresents or has misrepresented that consumers'  
15 computers are at risk of harm through alarmist warning symbols and  
16 verbal warning messages when, in fact, the problems discovered on  
17 consumers' computers in some instances are minimal and harmless;
- 18           b. Defendant misrepresents or has misrepresented the level of threat as  
19 severe when, in fact, the problem labeled as severe is innocuous;
- 20           c. Defendant misrepresents or has misrepresented the condition of  
21 consumers' computers through multiple pop-up reminders of problems  
22 on the consumers' computers;
- 23           d. Defendant misrepresents or has misrepresented the utility of a software  
24 product through graphical images showing the amount of hard disk  
25 space that the product can restore;
- 26

- 1 e. Defendant misrepresents or has misrepresented the utility of software  
2 product through false claims of the benefits of the software, including  
3 but not limited to the software's ability to increase the speed of the  
4 consumer's Internet connection up to 375 percent;  
5  
6 f. Defendant misrepresents or has misrepresented that the consumer's  
7 computer does not have optimized Internet settings when, in fact, the  
8 computer has installed an Internet optimizer; and  
9  
10 g. Defendant misrepresents or has misrepresented that its software is  
11 recommended by Microsoft in emails with deceptive subject lines.  
12  
13 h. Defendant misrepresents or has misrepresented that its "free" scan will  
14 prove to a consumer that the software will improve their computer's  
15 speed when, in fact, the consumer must purchase the software before he  
16 or she could potentially notice any difference in his or her computer's  
17 speed or operation.

18 4.3 The misrepresentations listed above are material misrepresentations that affect  
19 the consumer's decision whether to purchase Defendant's products constitute unfair and  
20 deceptive acts or practices in trade or commerce and unfair methods of competition in violation  
21 of the Consumer Protection Act, RCW 19.86.020.

22 **V. SECOND CAUSE OF ACTION – MATERIAL OMISSIONS OF FACT IN**  
23 **VIOLATION OF THE CONSUMER PROTECTION ACT**

24 5.1 Plaintiff realleges paragraphs 1.1 through 4.3 above and incorporates them as  
25 though fully set forth herein.

26 5.2 During the course of advertising, marketing, and selling its various software  
products, Defendant omits material facts related to its software, including:

- a. Defendant fails or has failed to disclose the installation of advertising  
software when consumers install free scan software;

- 1                   b. Defendant fails or has failed to disclose a means by which consumers  
2                   can disable the pop-up reminders from appearing on their computer  
3                   screens; and  
4                   c. Defendant fails or has failed to disclose a means by which consumers  
5                   can uninstall the free scan software and advertising software.

6           5.3 The material omissions of fact described above constitute unfair and deceptive  
7           acts or practices in trade or commerce and unfair methods of competition in violation of the  
8           Consumer Protection Act, RCW 19.86.020.

9           **VI. THIRD CAUSE OF ACTION – UNFAIR AND DECEPTIVE NEGATIVE**  
10           **OPTION AND AUTOMATIC RECURRING BILLING**

11           6.1 Plaintiff realleges paragraphs 1.1 through 5.3 above and incorporates them as  
12           though fully set forth herein.

13           6.2 Defendant checks by default, i.e., pre-checks, boxes for optional items on the  
14           check-out page for the purchase of Defendant's software products.

15           6.3 Numerous consumers are billed for the optional items because they do not un-  
16           check the boxes.

17           6.4 Numerous consumers have complained to Defendant about unexpected charges  
18           for the optional items.

19           6.5 Defendant fails to disclose clearly and conspicuously when automatic recurring  
20           billing is applied to the purchase of a software product.

21           6.6 The conduct described above constitutes unfair or deceptive acts or practices in  
22           trade or commerce and unfair methods of competition in violation of RCW 19.86.020.

1     **VII.   FOURTH CAUSE OF ACTION – DECEPTIVE MISREPRESENTATION OF**  
2     **EXTENT TO WHICH ASCENTIVE’S SOFTWARE IS NECESSARY FOR**  
3     **MAINTENANCE, UPDATE, OR REPAIR OF COMPUTER IN VIOLATION OF**  
4     **THE COMPUTER SPYWARE ACT, RCW 19.270**

5           7.1     Plaintiff realleges paragraphs 1.1 through 6.6 above and incorporates them as  
6     though fully set forth herein.

7           7.2     Defendant has used misleading and deceptive techniques to sell its suite of  
8     software. These techniques are set forth in paragraph 4.2. Each of these misrepresentations  
9     deceives the consumer into believing that the installation of Defendant’s suite of software is  
10    necessary for maintenance, update, or repair of the computer for the proper operation of the  
11    computer and induces consumers to do so.

12          7.3     The inducement of an owner or operator to install a computer software component  
13    onto a computer by deceptively misrepresenting the extent to which installing that software is  
14    necessary for maintenance, update, or repair of the computer for proper operation of the computer  
15    is prohibited by RCW 19.270.040 of the Computer Spyware Act.

16     **VIII.   FIFTH CAUSE OF ACTION – MISLEADING AND DECEPTIVE**  
17     **SUBJECT LINES IN COMMERCIAL ELECTRONIC MAIL IN**  
18     **VIOLATION OF THE COMMERCIAL ELECTRONIC MAIL ACT**

19          8.1     Plaintiff realleges paragraphs 1.1 through 7.3 above and incorporates them as  
20    though fully set forth herein.

21          8.2     Defendant has used misleading and deceptive subject lines in email marketing  
22    campaigns.

23          8.3     For example, in one email marketing campaign to advertise its ActiveSpeed  
24    product, Defendant used the subject line: “Your internet connection is slower than it should be.”

25          8.4     Defendant has no knowledge regarding the speed of Internet connections of the  
26    computers of the consumers who received the email with the above subject line.

8.5 The transmission of a commercial electronic message to a computer located in Washington or to an electronic mail address that the sender knows or has reason to know is held by a Washington resident that contains false or misleading information in the subject line is prohibited by RCW 19.190.020 of the Washington Commercial Electronic Mail Act and is a *per se* violation of the Consumer Protection Act, RCW 19.86.020.

## IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, State of Washington, prays for relief as follows:

9.1 That the Court adjudge and decree that Defendant has engaged in the conduct complained of herein.

9.2 That the Court adjudge and decree that the conduct complained of in paragraphs 3.1 through 6.6 and 8.1 through 8.5 constitutes unfair or deceptive acts and practices and unfair methods of competition in violation of the Consumer Protection Act, RCW 19.86.

9.3 That the Court adjudge and decree that the conduct complained of in paragraphs 3.19 through 3.24 and 8.2 through 8.5 constitutes violations of the Commercial Electronic Mail Act, RCW 19.190.

9.4 That the Court adjudge and decree that the conduct complained of in paragraphs 3.1 through 3.18, and 3.25 through 7.3 constitutes violations of the Computer Spyware Act, RCW 19.270.

9.5 That the Court issue a permanent injunction enjoining and restraining Defendant and its representatives, successors and assigns, officers, agents, servants, employees and all other persons acting or claiming to act for or on behalf of or in active concert or participation with Defendant from continuing or engaging in unlawful conduct complained of herein.

9.6 That the Court assess a civil penalty, pursuant to RCW 19.86.140, of up to \$2,000 per violation against Defendant for each violation of RCW 19.86.020 and up to \$500 per violation for each violation of RCW 19.190.020 caused by the conduct complained of herein.

1           9.7    That the Court make such orders pursuant to RCW 19.86.020 as it deems  
2 appropriate to provide for restitution to consumers for money or property acquired by Defendant  
3 as a result of the conduct complained of herein.

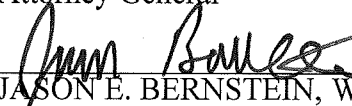
4           9.8    That the Court make such orders pursuant to RCW 19.190.090 as it deems  
5 appropriate to provide recovery for damages for each violation of RCW 19.190.020.

6           9.9    That the Court make such orders pursuant to RCW 19.86.020 and  
7 RCW 19.190.090 to provide that Plaintiff, State of Washington, have and recover from Defendant  
8 the costs of this action, including reasonable attorneys' fees.

9           9.10   That the Court order such other relief as it may deem just and proper to fully and  
10 effectively dissipate the effects of the conduct complained of herein or which may otherwise seem  
11 proper to the Court.

12           DATED this 14<sup>th</sup> day of December, 2010.

13                               ROBERT M. MCKENNA  
14                               Attorney General

15                                 
16                               JASON E. BERNSTEIN, WSBA #39362  
17                               Assistant Attorney General  
18                               Attorneys for Plaintiff  
19                               State of Washington  
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